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In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is submitted in accordance with the request made by the Chief Justice and Mr. Justice Black, at the oral argument of the case.

1. *The issues presented:* The issues raised by the Government in this Court concern the measure and amount of damages properly allowable to respondent on account of the Government's cancellation, on February 24, 1942, of its Notice of Award, issued on February 23, 1942. As formulated in the

Government's petition (p. 2) and brief (p. 2), the questions presented are:

> 1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.
>
> 2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

In answer to these questions, we have urged that, on the basis of the Court of Claims' own findings, respondent was not entitled to anticipated profits of $80,000 as damages, since the court's evidentiary findings concerning the company's ability to perform and its prospects of making a profit do not support the ultimate determination of liability. (Brief for the United States, Point I, pp. 18-35). We have also argued that, in any event, the Government had the right to terminate respondent's war contract without liability for unearned anticipated profits, because (a) respondent's formal and definitive contract, which was expressly contemplated in the Notice of Award, would probably

have contained a clause authorizing such termination, and (b) the First War Powers Act, independently of contractual provision, authorized such termination. (Brief for the United States, Point II, pp. 33-58).

In connection with this second point, the preliminary nature of the Notice of Award was stressed on oral argument, and the suggestion was advanced, in further elaboration of the discussion contained in the brief, that a Notice of Award was a contractual instrument of such a character that unearned anticipated profits should not be allowed for its cancellation or breach. The Government raises no question with regard to the Court of Claims' finding that the Navy's Notice of Award was validly issued, and created a binding agreement between the United States and respondent. That finding was accepted in the Government's petition (p. 12, fn. 3) and in its brief (p. 18), and is not challenged now. However, we have always disputed the lower court's award of $80,000 for anticipated profits for the cancellation of the Notice of Award, and on the issue of damages we emphasize the nature of that agreement as directly bearing on the type and amount of the damages to be recovered. This memorandum is mainly devoted to a consideration of that point.

2. *Nature of the Notice of Award and liability for its cancellation:* As was pointed out in our main brief, the agreement involved here was cre-

ated by the Navy's sending respondent a short Notice of Award on February 23, 1942 (R. 20). That Notice, after stating that respondent's proposal was accepted, went on: "This acceptance is your authority to commence performance in accordance with the terms of your proposal without waiting for the formal contract, * * *" (R. 14). This language of the Notice of Award, taken together with the further language "Pending receipt of the contract * * *" (R. 14), demonstrates plainly that the Notice of Award was only a contractual instrument preliminary to the formal written contract, which would set out in detail the rights and liabilities of the parties. It is the Government's position that anticipated unearned profits may not properly be awarded for the termination of such a preliminary contractual instrument.

(a) During World War II, the service departments were confronted with the urgent problem of getting production started with the least possible delay. It was imperative that production not be held up pending the negotiation and execution of definitive contracts. Contractors, however, were reluctant to undertake production without a binding assurance by the Government that they would be reimbursed for the costs incurred, if no definitive contract were ultimately executed. In order to give contractors the required assurance and thus not to hold up production until a definitive contract were negotiated, the service departments developed vari-

ous preliminary contractual instruments—to be superseded by a definitive agreement as soon as possible—to bridge the period between the commencing of production and the negotiation of the definitive contract. Several such instruments, varying in the definitiveness of terms in accordance with the stage of negotiations, were developed. Among these instruments was the Notice of Award, which, although it most nearly approximated a definitive contract, still did not contain more than a skeleton of a final contract; and was intended, as in the present case, to be superseded by such a contract. See Fain and Watt, *War Procurement—A New Pattern for Contracts*, 44 Col. L. Rev. 127, 130-135.

In view of their limited purpose of assuring the contractor of reimbursement for costs incurred pending negotiation and execution of a definitive contract, practically all preliminary contractual instruments expressly excluded any allowance for unearned profits in the event of termination. Most of these instruments went further and even prohibited the allowance of profits on work actually done. Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemp. Prob. 449, 493-494. Thus, the letter of intent, a common preliminary contractual instrument, in its usual form, as here used, authorized the respondent immediately to purchase materials and to proceed with production; but under this letter of in-

tent, the sole items recoverable were the costs incurred in connection therewith if no order was placed by April 1, 1942 (R. 12).[1] Under the letter purchase order, another preliminary contractual instrument which placed an order for a specified item, the contractor was normally entitled to reimbursement only "for the costs incurred in the performance of this order." The letter contract, which specified a definite quantity at a definite price, entitled the contractor, in the event of termination to payment of "a sum equal to reimbursement for all costs incurred."[2] Since they were used for the same purpose as the other preliminary contractual instruments, Notices of Award, such as that issued in this case, should likewise be read to contain, by necessary implication, a provision barring recovery of profits on work not done, and limiting the contractor to his costs and profits on the work performed for the government.

(b) Moreover, at the time of the issuance and cancellation of the Notice of Award in this case, the final agreement as to the provisions of the definitive contract remained to be negotiated. Under the con-

[1] In this case, however, authority even to incur expenses under the letter of intent was withdrawn by the Navy's letter of January 7, 1942 (R. 18).

[2] Although there is an inconsistency between the express provisions limiting reimbursement to actual costs incurred and the termination provisions incorporated by reference in the letter contract, the contractor apparently received only actual costs in the event of termination. See Mahnan, *supra* at 493. But even under the termination provision, the contractor was not entitled to profit on work not performed.

sistent Navy and War Department practice, such a definitive agreement, containing many clauses and provisions, would have been entered into at some later date. It is impossible now to ascertain what the provisions of that definitive contract would have been, since they were to be determined by negotiation, and no such negotiation in fact took place. Especially at that time (Spring, 1942), the contract provisions used by the war procuring agencies were in a state of flux, and constantly varied to meet newly-discovered problems or to cure working defects in existing forms. Respondent's final contract might thus have contained all sorts of provisions, some of which it might have found it difficult to comply with and, at the same time, make a profit on the contract. For instance, if the formal agreement had included a usual type of Delays-Damages clause, imposing penalties for each day of delay, this respondent might well have found itself faced with a staggering loss (cf. Brief for the United States, pp. 20-26). And the record does definitely indicate one Navy requirement—a performance bond, which the Navy had decided to require in this case—which respondent probably could not have met. There is grave doubt whether respondent could have obtained the additional substantial working capital necessary to secure this required performance bond (cf. Brief for the United States, p. 5, 23-4, 29-30). In short, the nebulous state of the final contract, and the ac-

companying uncertainty whether respondent could have performed all the provisions finally agreed upon, make respondent's claim for anticipated profits speculative, hypothetical, and outside the realm of reasonable certainty, falling far short of the clear and direct proof required to sustain such an award.

Also, it should not be forgotten that, as compared to the usual case of awarding anticipated profits for breach of contract, the wartime conditions at the time respondent would have been required to perform its contract make the possibility that the company would have earned a net profit even more speculative and uncertain. During that period, material and labor were becoming scarce; men were being withdrawn from the labor market by the armed forces; production was increasing by leaps and bounds; companies, such as respondent, were entering into new fields of manufacture, which they had never undertaken before, and on a scale which had never before been attempted. It was a period of extreme fluidity of conditions, costs and profits, and one in which it was difficult, if not impossible, to forecast whether any given contract would be performed at a profit, and the particular provisions of the particular contract might be decisive. Cf. Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 6868, 77th Cong., 2d sess., p. 24 (testimony of General Somervell, Commanding General, Services of Supply, War

Department, quoted in our main brief, p. 31). "The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of costs were out of the question." *Lichter* v. *United States*, 334 U. S. 742, 767. This general uncertainty of the conditions of production, added to the indeterminate status of the final contract, deprives respondent's claim to unearned profits of all support.

In addition, it was foreseeable, late in February, 1942, that the President or Congress, in the exercise of the war powers, might take action which would reduce, if not eliminate, the profits which respondent might have earned on its contract. At the time of the award, legislation to reduce and control profits on war contracts was already under consideration, and the Renegotiation Act, dealing with that problem, was enacted shortly thereafter on April 28, 1942. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245. Had respondent been permitted to perform, its profits, if any, would have been subject to renegotiation under that Act. *Lichter* v. *United States*, 334 U. S. 742, 788. All these circumstances cast further doubt on whether unearned anticipated profits should be allowed for cancellation or breach of a Notice of Award.

(c) These conclusions are buttressed by the fact that even definitive contracts entered into at that time usually contained a termination provision (cf. Brief for the United States, pp. 36-41). As pointed out in our main brief, all War Department contracts at that time were required to contain a termination provision prohibiting unearned profits in the event of termination, and the Navy Department similarly developed "standard termination clauses for fixed price contracts * * * late in 1941 * * * [which clauses] in general form and substance have been inserted in most contracts * * *." (Main brief, pp. 39-40; petition, p. 18, fn. 11). Since most Navy contracts contained such a clause, the Notice of Award should similarly be read, in light of these usual provisions, to contain such a termination clause barring unearned profits on work not done. The present situation is analogous to that in the field of insurance, where temporary insurance in the form of a binder (equivalent to the preliminary contractual instrument here involved) is issued for the convenience of all parties, to continue in effect until the execution of a formal policy. *Sherri* v. *National Surety Co.*, 243 N. Y. 266, 270. There, the rule is that, on a loss incurred prior to the issuance of the policy, the obligations of the parties are "according to the terms of the policy in ordinary use by the company." *Lipman* v. *Niagara Fire Ins. Co.*, 121 N. Y. 454; *Eames* v. *Home Ins. Co.*, 94 U. S. 621, 629;

Fisher v. *Underwriters at Lloyd's, London*, 115 F. 2d 641, 645 (C. A. 7); *Sherri* v. *National Surety Co.*, *supra*; *Eureka Insurance Co.* v. *Robinson*, 56 Pa. 256, 264; *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346, 353-354; 1 Williston, Contracts (Rev. Ed.), pp. 65-66. In the *Fisher* case, *supra*, while the previous policies between the parties had excluded the first two days of disability from the liability of the insurer to pay a specified rate per day during the insured's periods of disability, no policy had been issued for the disability involved in the suit, and nothing had been said in the preliminary negotiations in regard to this two-day provision. The court nevertheless held that provision to be an implied term of the insurance. "In a preliminary contract, it will be presumed that the parties contemplated such form of policy, containing such limitations and provisions as are usual in such cases, or have been used before between the parties." 115 F. 2d at 645. Similarly, here, since a termination provision was usual (*i. e.*, used in most contracts entered into by the Navy), the preliminary contractual instrument should be read to contain such a provision.

We do not argue that the final contract in this case would surely have contained a termination clause. But we do urge that the probability of there being such a provision in the definitive agreement necessarily adds a further significant speculative factor to respondent's claim, and means that

respondent cannot, and has not, sustained its burden of showing its loss of profits by the required "clear and direct proof."

(d) Finally, we believe that the Notice of Award should be read in light of the well established policy, administrative and legislative, in World War II against allowing unearned profits on war contracts, even formal, definitive ones. The policy against war profiteering which was developed in World War II went beyond that of the first World War. In World War I, this policy was directed only against unearned profits on terminated contracts. In World War II, the Government's policy not only forbade unearned profits on terminated contracts, as reflected in the termination clauses used by the war procurement agencies and in the Contract Settlement Act (cf. Brief, pp. 37-38, 45-46), but also prohibited unreasonable profits on work actually done, as shown by the Renegotiation Acts.[3] This policy against war profiteering, we submit, should be given effect in considering whether respondent may recover $80,000 as unearned anticipated profits

[3] The factors to be considered in determining excessive profits, as set out in Section 403(a)(4)(A) of the Renegotiation Act of April 28, 1942, as amended, clearly are phrased in terms of allowing profits only in connection with work actually done. For example, subparagraph (i) deals with "efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower"; subparagraph (ii) sets out, as a factor, "reasonableness of costs and profits"; subparagraph (iv) deals with "extent of risk assumed" and subparagraph (v) with "nature and extent of contribution to the war effort." See 334 U. S. at 799.

on a preliminary war contract which was created and terminated practically simultaneously, and on which no work had been done, no expenses incurred, and no commitments made.

3. *Statutory authority for the contract:* During the period here involved, there was in effect Section 2(a) of the National Defense Act of June 28, 1940, 54 Stat. 676, 50 U. S. C. App. 1152(a), which authorized the Secretary of Navy, during the national emergency, "to negotiate contracts for the acquisition, construction, repair or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor * * * and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. * * *".

Also in effect, at the time of the award, was Title II of the First War Powers Act (Act of December 18, 1941, 55 Stat. 839) providing:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, per-

formance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

The President delegated this authority to the Navy Department by Executive Order No. 9001 (dated December 27, 1941, 6 Fed. Reg. 6787, 3 CFR 1941 Supp.; pp. 330-332), which permitted the making of contracts without regard to the then-existing statutory provisions governing Navy Department procurement, with certain exceptions.[4] The Notice of Award in this case (dated February 23, 1942) was presumably issued under the authority of the First War Powers Act and Executive Order No.

[4] The Executive Order required that all contracts made under its authority contain (a) an anti-discrimination clause, (b) a warranty against employment of contingent-fee brokers, and (c) the appropriate clauses where required by the Walsh-Healey, Davis-Bacon, Copeland, or Eight-Hour laws. Cost-plus-a-percentage-of-cost contracts were forbidden, and compliance was directed with the requirements of existing law relating to limitation of profits. At that time (February 1942), there were no profit-limitation provisions applicable to respondent's contract.

9001. (On the First War Powers Act, see our main brief, pp. 42-3, 47-51, and cf. Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col. L. Rev. 194).

Respectfully submitted,

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v.

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On Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims has not yet been reported. Its special findings of fact, conclusion of law, opinion, and judgment are set out in the Record at pp. 16-22, 22, 22-26, 26, respectively.

JURISDICTION.

The judgment of the Court of Claims was entered February 2, 1948 (R. 26). A motion for a new trial was denied June 1, 1948 (R. 27). The petition for a writ of certiorari

was filed August 31, 1948. The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 USC § 288, New Judicial Code, 28 U.S.C. § 1255 (1)).

QUESTIONS PRESENTED.

1. Whether the Court of Claims' special findings of fact that petitioner and respondent had entered into a binding contract, that petitioner unilaterally and without right breached that contract, and that respondent was damaged in the sum of $80,000 are conclusive and not reviewable upon petition for a writ of certiorari.

2. Whether anticipated profits can be recovered as damages in an action for breach of contract.

3. Whether in the absence of any express contractual reservation, the Government had the right, by reason of any administrative practice or statute, unilaterally to cancel its contract with respondent and whether, in any event, this question is open on the present record.

STATEMENT.

On June 21, 1944, respondent filed a petition in the Court of Claims to recover its damages arising out of petitioner's unauthorized breach of contract for delivery of certain naval gun mounts (R. 1-4). After full hearings and argument, the Court of Claims entered judgment for the respondent in the sum of $80,000 (R. 26) predicated upon its exhaustive special findings of fact (R. 16-22), conclusion of law (R. 22) and its supporting opinion (R. 22-26). Petitioner's motion for a new trial was denied by order of June 1, 1948 (R. 27).

The facts upon which respondent's claim was predicated and the judgment below was founded are fully detailed in the Court of Claims' special findings of fact. Briefly, those findings show that respondent, a Virginia manufacturing

corporation (R. 16), with an extensive plant and facilities at Waynesboro, Virginia (R. 17), entered into negotiations with the Navy Department, early in 1941, regarding its production of gun mounts (R. 17). Respondent submitted its proposal and also gave the Navy a list of equipment it owned or deemed available for the proposed production (R. 17). Respondent's proposal showed that it contemplated subcontracting for the necessary castings and certain other component parts to be incorporated in the gun mounts (R. 10, 17, 19). It was also shown that respondent had carefully surveyed and planned for its labor supply (R. 19). Additionally, respondent had made considerable expenditures and incurred obligations in 1940 and 1941 to improve its plant, to prepare and furnish the data requested by the Navy incident to negotiations for a production contract, to prepare machine tool analyses and to obtain necessary managerial and engineering personnel (R. 16, 17, 20, 21, 26).[1]

After a naval representative had inspected respondent's plant and conferred with its manager who was an engineer highly thought of by the government for his experience and ability (R. 17, 25), respondent was requested to and did furnish additional information as to its financial ability, commitments of sub-contractors, and machine tool operations, upon the basis of which respondent slightly modified its previous proposals (R. 17). Thereafter at a conference on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedules, payments and options for additional production of mounts was accepted as satisfactory (R. 17).

Finally, on December 29, 1941, the Navy issued a "letter of intent", to respondent confirming its previous advice that an order for gun mounts would be placed with it, which

[1] The award made by the Court of Claims excluded and does not compensate respondent for losses on account of such expenditures or for loss suffered by reason of its inability to produce other items after its tools and machinery were requisitioned by the government in 1942 (R. 21-22).

was accepted by respondent on January 10, 1942 (R. 17-18; Resp. Ex. No. 3, R. 12-13).[2] On February 23, 1942 the Navy mailed a "Notice of Award" of contract No. LL96553 in the amount of $2,087,355 which respondent received the next day (R. 20; Resp. Ex. No. 4; R. 13-14).[3] Shortly after the notice of award was issued, petitioner cancelled the contract (R. 20).

The Court of Claims found that "if the [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21), and the court entered judgment accordingly (R. 26).

ARGUMENT.

Introduction.

Although petitioner denied the existence of a contract in the trial below, it now concedes that the notice of award effected a binding contract (see fn. 3 *supra*), but contends:

1. That respondent was not entitled to an award of damages because

   (a) its alleged loss of profits was speculative in that it could not have performed the contract, and

   (b) in any event the alleged loss of profits was not recoverable in damages upon the Government's breach of contract.

2. That, both under Title II of the First War Powers Act as implemented by Executive Order No. 9001 and administrative war procurement policy, the Government "may well have" been authorized to cancel or terminate respondent's contract, even though it did not contain any termination clause.

---

[2] The letter of intent did not ask for or mention a performance bond, and no question is involved here as to such a bond.

[3] Petitioner states that "For the purposes of this petition, we shall assume that the notice of award, dated February 23, 1942, consummated a binding contract" (Pet. 12, fr. 3).

While respondent will show that these contentions are without merit, it is appropriate to note that the primary contention—that relative to compensable damages—seeks nothing more than a reconsideration of the evidence upon which the judgment below was predicated, and this, it will be shown, is foreclosed by the definitive and conclusive special findings of the Court of Claims. This contention does not raise questions of such character or importance as to justify the exercise of the power of certiorari. Rules 38 (5) and 41, Revised Rules of the Supreme Court. Certiorari will not be granted merely to review evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175; *United States* v. *Johnston*, 268 U. S. 220. Thus, in comparable circumstances, this Court has denied certiorari to bring up a patent case involving no conflict of authority but merely the usual questions of fact inherent in such litigation. *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314.

Petitioner's contention with respect to its right to cancel similarly furnishes no basis for certiorari. That defense was not raised below in the pleadings, the hearings or by brief or argument, and it was first injected into the case upon motion for a new trial. There is nothing in the record upon which this contention can be founded or posed here, and, in any event, as will be shown hereinafter, it is utterly without merit and is not supported by any authority. Accordingly, certiorari here would appear proscribed by the principles enunciated by this Court that certiorari is "* * * to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258.

I.

The Court of Claims' Finding That Respondent Would Have Made a Net Profit of Not Less Than $80,000 If It Had Been Permitted to Perform Its Contract is Conclusive, Consistent With Other Findings and Not Reviewable.

A. The finding as to damages is amply supported in the record.

Petitioner's contention that the anticipated profits of $80,000 awarded in damages were purely speculative (Pet. 12-17), must fail because that contention is predicated upon an evaluation of evidence which does not appear in the record here. As a matter of fact, petitioner omits to state that respondent adduced considerable evidence at the trial below—such as complete cost accounting data and engineering manufacturing estimates upon which the contract was negotiated—showing that it would have made a net profit of from 8% to 10% of the contract price.

It is evident from the record before this Court that the special finding below, that respondent would have made a net profit of not less than $80,000 if it had been permitted to perform, was not speculative but that it was derived from substantial evidence adduced by respondent and evaluated by the Court of Claims as the finder of fact. Thus, the court considered evidence showing that respondent had fully and carefully planned for production under the contract (R. 17, 19, 22-23, 25), that it had made various necessary sub-contracting arrangements (R. 19), that it had surveyed and planned its labor requirements and supply (R. 19), that its plant facilities were accepted as satisfactory by the Navy (R. 17), that it had secured expert engineering services for management to be compensated for by a percentage of profit (R. 17, 25), that the respondent was willing to finance performance without advance funds from the Navy (R. 25) and that after various conferences between officials of respondent and the Navy and upon the submis-

sion by respondent to the Navy of detailed supporting data as to its plans, equipment and proposals, they were accepted as satisfactory and the contract awarded (R. 17, 23-24). Even if the Court of Claims had not marshalled these various evidentiary findings, as it did, it must be assumed that such evidentiary findings were considered and evaluated in arriving at the ultimate finding of fact that respondent would have made a profit. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 321.

Petitioner makes much ado (Pet. 15-16) about the fact that several of the items of proof which were marshalled in support of the Court of Claims' judgment were set forth in its opinion rather than in its findings of fact. Petitioner notes that the opinion rather than the findings of fact referred to factors such as that respondent's production manager, who was highly thought of by the Government for his experience and ability, was willing to work for the respondent on a percentage of profits basis (R. 25), that the stockholders of respondent were willing to finance performance without any advance funds from the Government (R. 25), and that the Government might be expected to show some tolerance to war contractors doing their best to perform (R. 25, 26), all of which were mentioned by the court below as reflecting on the probability that the contract could be performed at a profit.

All of these factors noted in the Court of Claims' opinion are fully supported by the evidence adduced below—which, of course, is not part of the record here—and the Court no doubt would have made them part of its findings of fact if they were necessary to support its judgment. However, they were only mentioned by the court as facts and circumstances, supplemental to the primary evidentiary findings which have already been summarized and which were set forth in its findings, furnishing additional explanatory support for the judgment. Consequently their omission from the findings of fact is of no consequence, for they served merely as additional explanation of the reasons for the actual findings made. See *United States* v. *Wells*, 283 U. S.

102, 120-121.[4] There are additional observations in the opinion of the same explanatory nature which are not subject to objection on the score that they should have been included physically in the special findings of fact. Such additional observations include, *inter alia*, those to the effect that in any case where a long term production contract is breached at the outset there may be uncertainties as to what the future might bring (R. 25), that the difficulties which respondent had to overcome were not unique or unanticipated in the vast conversion from peacetime to wartime production (R. 19), and that the belief of both the Navy and the respondent that respondent could perform the contract at a profit was implicit in the Navy's acceptance of respondent's proposal which included an option by the Navy to require respondent to produce additional mounts (R. 17).

B. The special finding on loss of profits is consistent with the other findings.

Petitioner argues that the finding of fact that respondent would have made a net profit of at least $80,000 is inconsistent with other findings reflecting on respondent's capacity to have produced the gun mounts in accordance with the contract and at a profit (Pet. 12-13). Petitioner also contends that the Court of Claims should have made a negative finding that respondent "had not proved that it

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[4] "It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers [121] was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained." 283 U. S. at 121.

could have successfully performed the contract and made a profit thereon" (Pet. 10). For reasons already discussed hereinabove, there is no inconsistency in the findings below. The Court of Claims as the finder of fact merely mentioned the difficulties which respondent might have encountered in producing under the contract as one item which had to be taken into consideration with all of the other evidence showing that it would have been performed at a profit. Obviously, the Court of Claims concluded that the evidence concerning the problem of performance was overcome by the greater probative value of that proving respondent's ability to perform at a profit.

In any event, the references to respondent's potential difficulties in performance do not have the significance which petitioner attributes to them, for the Court of Claims found (R. 17) that after full conferences with respect to respondent's proposals, including full and complete information concerning its plant, production capacity and delivery schedules, the Navy accepted those proposals as satisfactory. Thus, in assessing the probative value of the evidence as to respondent's difficulties in producing, the Court of Claims necessarily considered the fact that even though all of these difficulties were known to the Navy Department beforehand, respondent's plant and proposals were accepted as satisfactory and the contract was awarded. Moreover, contrary to petitioner's implication, the Court of Claims did not entirely reject the evidence showing that respondent might have difficulty in producing under the contract, but it took that evidence into consideration in scaling the respondent's anticipated profit down from the claimed figure of 8% to 10% to approximately 4%, resulting in the final award of only $80,000.

For the foregoing reasons, there is no merit in petitioner's contention that the Court of Claims should have made a negative finding that respondent would not have been able to successfully perform under the contract. Petitioner is, in effect, challenging the weight of the evidence to support

this special finding and is suggesting that an opposite conclusion should have been reached by the trier of the facts in the process of weighing the evidence. The finding that respondent would have made not less than $80,000 taken together with the other findings of fact, which are wholly consistent, necessarily excluded the possibility that respondent could not have performed under the contract at a profit. In such circumstances, a negative finding would have been erroneous and would not have been required by reason of positive findings covering the same subject. See *Oregon-Washington R. & N. Co.* v. *United States*, 255 U. S. 339, 349.[5]

C. The Court of Claims' finding of fact as to damages is not reviewable on certiorari.

In any event, petitioner's attack upon the findings as to damages is proscribed by the established practice of this Court with respect to review of Court of Claims cases. This Court has repeatedly held that it cannot review Court of Claims' findings of fact and that such findings are conclusive. *United States* v. *Causby*, 328 U. S. 256; *Fred. T. Ley & Co.* v. *United States*, 273 U. S. 386; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *Stilz* v. *United States*, 269 U. S. 144; *Saalfield* v. *United States*, 246 U. S. 610; *Wm. Cramp & Sons Ship and Engine Bldg. Co.* v. *United States*, 239 U. S. 221; *Mahan* v. *United States*, 14 Wall. 109. It is the duty

[5] "The government further urges that the proposed amendment to finding VI, is covered by findings VI [349] and IX., and is only a request 'to change a negative to a positive finding;' that the amendment to finding X is 'rather an argument that certain conclusions should follow from facts found,' and that 'its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.' The amendment to finding XI, is, the government says, 'a request to find evidence,' which is contrary to the rules; and, besides, the evidence is immaterial.

"We concur with the government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the government as final, and not as tentative." 255 U. S. at 349.

of the Court of Claims to deal with conflicting evidence or inferences to which evidence might give rise. *United States* v. *Esnault Pelterie*, 303 U. S. 26. It is not the function of this Court to examine the evidence to determine whether it supports a finding of the Court of Claims. *United States* v. *Causby*, *supra*, 328 U. S. at 268. The findings of the Court of Claims determine all matters of fact precisely as does the verdict of a jury, and this Court is not—so it has said—at liberty to refer to the opinion of the Court of Claims in order to eke out, control or modify the scope of the findings. *Crocker* v. *United States*, 240 U. S. 74. Consequently, since, in the instant case, the Court of Claims made an articulate and unambiguous finding of fact that respondent would have made a net profit of not less than $80,000 if it had been permitted to perform its contract, that fact must be taken as conclusively established.

II.

Anticipated Profits Can be Awarded as Damages in Consequence of an Unauthorized Breach of Contract by the Government.

While petitioner inferentially asserts the contrary, it is clear that the law of damages allows recovery of anticipated profits upon breach of contract. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313; *Anvil Mining Co.* v. *Humble* 153 U. S. 540; *Cincinnati Siemens-Lungren Gas Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 206; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 454-455; *Hinckley* v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 275; *Phila. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 344. See also memorandum of the Attorney General quoted *infra* at p. 20.

Respondent concedes that a claim for loss of profit must be proved and not be based on mere speculation. But, as we have already stated, respondent adduced considerable evidence below, such as detailed cost accounting data, upon

which its anticipated profits were predicated, and which apparently satisfied the Court of Claims. Thus the situation is materially different from that in *United States* v. *Behan*, 110 U. S. 338—upon which petitioner relies (Pet. 14)—for in that case the Court of Claims specifically stated and this Court noted that the claimant had adduced no proof whatsoever in support of its claim for loss of profits. The proof adduced below in support of the inclusion of profits in damages was essentially the same as that in *Anvil Mining Co.* v. *Humble*, *supra*, where the claimant proved and was allowed his probable future profit under a mining contract on a showing of the contract price as against the cost data for production.

Actually, petitioner confuses approximated future profits—which are allowable in damages—and purely speculative profits which, of course, cannot be awarded upon breach of contract. Thus, where the claimant fails to adduce any proof as to profits, an award including them would, as shown in the *Behan* case, be purely speculative. Similarly, where the profit item was not within the contemplation of the parties in entering into the contract, as for example where they are the fruits of independent and collateral engagements or contingent upon future bargains, they would be considered speculative. *Western Union Telegraph Co.* v. *Hall*, *supra*. Thus in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199—upon which petitioner also relies (Pet. 14)—loss of profit from the claimant's anticipated productive use of machinery which the other party had contracted to repair was properly denied as damages because it was remote to the contract breached in that it was not within the contemplation of the parties in contracting. In cases such as the instant one, however, the parties obviously contemplated that profit would be made from production under the contract, and consequently the loss of profits was directly related to and not a remote consequence of the breach. 15 Am. Jur. § 151; *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va., 1948). In the

sense that unless production were actually completed the precise profit could not be known, anticipated profits might be said to be speculative. This would appear to be the use to which petitioner puts the term speculative in this case. However, that usage would in effect bar recovery of all anticipated profits which, as already shown, are a proper item of damage. Actually, the better description of the anticipated or expected profits proved and allowed here is that they are approximated as indeed they must be since petitioner prevented performance. *Eastman Kodak Co.* v. *Southern Photo Materials, supra.* However, damages are not rendered uncertain because they cannot be calculated with absolute exactness; it is sufficient if a reasonable basis of computation is afforded, even though the result is approximate. *Eastman Kodak Co.* v. *Southern Photo Materials, supra.* See also *Gulf States Creosoting Co.* v. *Loving*, 120 F. 2d 195, 204 (C. C. A. 4, 1941). Such a basis of computation was furnished by respondent below in the cost accounting and engineering data submitted in evidence. And proof here was made more certain in determining respondent's costs because the cost of the steel castings and material parts to be furnished by sub-contractors was known. Certainly any possible margin of error or speculation in that evidence was removed by the determination of the finder of fact to scale down the asserted margin of profit so as to take account of potential production difficulties.

III.

Petitioner Had Neither Contractual Nor Statutory Right to Cancel the Contract With Respondent, and Since This Question is Outside of the Record, It is Not Before This Court.

A. On the present record, petitioner's contention as to the right to cancel is untimely.

After the Court of Claims had found that respondent would have made a net profit of at least $80,000 (R. 21), and

entered judgment accordingly (R. 26), petitioner, having previously failed to offer a valid reason for cancelling the contract, moved for a new trial (R. 27) on the ground *inter alia*, that the Government had a right to cancel the contract without being liable for damages for loss of profits even though the contract did not contain a cancellation clause. Neither the findings nor the opinion of the Court of Claims, which fully covered all of the defenses raised at the trial, reflected upon this contention because such a defense had not been offered at trial and no evidence had been offered to show whether or not any controlling governmental policy existed at the time the contract was awarded or cancelled which would have authorized termination without such liability. The Court of Claims properly denied the motion for new trial (R. 27) because the assertion therein that the contract was cancellable was untimely and was not directed to any error whether of law or fact since the issue had not been presented to or disposed of by the Court before judgment, and for the other reasons discussed in subsections B & C below.

What petitioner sought by its motion for a new trial and now seeks here violates all accepted judicial patterns, for it, in effect, asks a second opportunity—after full and fair resolution of all issues presented—to offer a theory or defense of which it failed to take advantage when opportunity and procedure required. See *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 544, 558 (App. D. C.), certiorari denied 305 U. S. 613. This second chance could not have been awarded under the rules of the Court of Claims and should not, we submit, be here given, for the review of the Court of Claims' judgment is confined to the record (Rule 41, Revised Rules of the Supreme Court) and that record does not show that petitioner's contention as to the right to cancel reflects error by the court below nor that the motion for a new trial first raising this defense "was one made upon evidence or otherwise in accordance with statute". *United States* v. *Seminole Nation*, 299 U. S. 417, 421.

B. When this contract was awarded and cancelled, cancellation was not justified by any established administrative policy.

Even assuming *arguendo* that petitioner can now urge its right to cancel, there is obviously no merit to its contention. Petitioner argues that the award of loss of profits was improper because a termination clause probably would have been inserted in the formal written contract between the parties in view of the established wartime procurement policy of including such clauses to permit the Government to terminate performance at any time (Pet. 17-20).

The Court of Claims found (Findings of Fact 3 and 4, R. 17-18; R. 23-24) and petitioner does not dispute (Pet. 12) that a binding contract was effected between the parties by respondent's acceptance of the Navy's letter of intent and by the issuance of a notice of award. Nothing contained in that contract expressly or impliedly authorized unilateral termination by the Government. Even if that contract could be modified by an alleged procurement policy of the buyer, the existence and effect of such a policy would be subject to timely proof. Yet, as we have noted, no proof was offered or adduced below upon which any such factual assertions as petitioner now advances could be founded.

In any event, the claims as to alleged government procurement policy have no force with respect to the instant contract. Even were it demonstrable that when this contract was negotiated and executed in late 1941 and early 1942, the War Department adhered to a policy of inserting termination clauses in procurement contracts, there is not one iota of evidence that the Navy Department, with whom this particular contract was made, definitively followed the same practice at that time. Not a single one of the references cited by petitioner in footnote 9 of the petition shows that the Navy, in contradistinction to the Army, had such a definite policy when this contract was awarded. And certainly references to statements of Navy officials made in 1943 and 1944 to the effect that termination clauses "developed late

in 1941" were inserted in "most contracts" (Pet. fn. 11, p. 18) is of no probative value to support the proposition that such a clause would have been inserted in this particular contract negotiated at the end of 1941. Actually, the first official Navy requirement that termination clauses should be inserted in procurement contracts was not issued until more than two years after the instant contract was executed. That requirement (Navy Contract Termination Directive No. 1 of February 28, 1944)[6] was issued after the establishment of the Joint Contract Termination Board on November 12, 1943 and the promulgation of the Joint Termination Regulation, effective January 8, 1944, both of which were the result of executive and legislative studies showing the need for uniformity in war contract and termination policies and procedures.[7] Accordingly, it is clear that petitioner and respondent did not agree to or contemplate that the Government would have the right unilaterally to cancel the contract. It is equally clear that there was no such articulation of *Navy* practice, when this contract was executed, as would justify any speculative inference upon which to read such a provision into the contract.

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[6] The directive (contained in *Navy Procurement Directives*) states in its first paragraph:

> "The Office of War Mobilization has prescribed a Uniform Termination Article for Fixed-Price Supply Contracts for use by Government procurement agencies and a Statement of Principles for Determination of Costs upon Termination of Government Fixed-Price Supply Contracts. The Secretary of the Navy hereby directs the insertion in all Navy fixed price contracts dated more than thirty days after the date hereof for the manufacture or sale to the Government in the continental United States of war supplies and equipment other than the contracts specified in paragraph 4 hereof, of the provisions set forth in Enclosure (A), which incorporates by reference Enclosure (B)".

[7] See U. S. Office of War Mobilization Report on War and Post-War Adjustment (1944), 90 Cong. Rec. No. 2, January 11, 1944. See also Hearings before Subcommittee of Senate Committee on Military Affairs on Problems of Contract Termination (considering S. 1268, S. 1280 and S. J. Res. 80, 78th Cong. 1st and 2nd. Sess., 1943-1944) which preceded enactment of Contract Settlement Act of 1944.

C. When this contract was awarded and cancelled, there was no statutory authority for unilateral termination.

Petitioner argues that the Navy "may well have been furnished" with the power to terminate this contract by virtue of a provision of the First War Powers Act, (Act of December 18, 1941, c. 593, Title II, Sec. 201, 55 Stat. 839; 50 U.S.C. App., Supp. V., 611) empowering the President to authorize any war agency to "enter into contracts and into amendments or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . . ", as implemented by Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R., 1941 Supp., pp. 330-332).

This contention is an abuse of reason and the plain language of the statute, and it is rebutted by consistent administrative interpretation to the contrary. Its vice is that it distorts a legislative grant for negotiated agreement into pretended authority for unilateral cancellation. A review of administrative interpretation and practice under the First War Powers Act confirms this. After the enactment of the statute and the promulgation of Executive Order 9001, the Secretary of War submitted to the Attorney General for opinion a proposed subdelegating order which provided:

> "The powers hereby delegated may be exercised by (a) supplemental agreements which may modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (b) *agreements with contractors or obligors* releasing accrued obligations of any sort * * * or (c) *supplemental agreements* and change orders suspending or modifying the operation of existing contracts * * *"[8] (Italics supplied).

[8] The Secretary's order is quoted in the text of 40 Ops. Atty. Gen., No. 53, August 29, 1942. That opinion, the proposed order and examples of action to be taken thereunder are all set out in full at pp. 360-368 of the Senate Hearings on Problems of Contract Termination *supra* fn. 7.

In his opinion as to the validity of the proposed order, the Attorney General confirmed the statutory requirement of bilateral action; stating (40 Ops. Atty. Gen. No. 53, August 29, 1942, at p. 9):

> "In passing the First War Powers Act, *the Congress desired to enable you* (Secty. of War), *and the contractors who supply you* with war material to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by (conditions and exigencies of war etc.") (Italics supplied.)

The same conclusion is evident from the opinion of the Judge Advocate General which states (1 Bull. J. A. G. No. 5, pp. 304-305, October 1942:

> "Under the First War Powers Act, 1941 (55 Stat. 838, 50 U. S. C. 611) and Executive Order No. 9001, issued pursuant thereto
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> > '*The Secretary of the War*, may, where it has been administratively determined that it will facilitate the prosecution of the war, *terminate contracts* for the convenience of the government *by entering into supplemental agreements* providing for negotiated lump-sum settlement * * *' whether or not such contracts contain clauses authorizing termination by the Government and providing a method of settlement in the event the contract is so terminated."[9] (Italics supplied.)

The Judge Advocate's opinion also quoted a decision of the Comptroller General of the Navy to the effect that termina-

[9] The Army Ordnance Department implemented the opinions quoted in the text by advice to its contracting officers on October 9, 1942 that the "Secretary of War has made the administrative determination that *negotiated* settlements, upon termination for the convenience of the Government when *agreed to by the contractor* will facilitate the prosecution of the war effort and the amendment of existing contracts to provide for such settlements has been authorized under the provisions of the First War Powers Act and Executive Order No. 9011. Existing contracts may therefore *with the contractor's consent* be amended so as to include provisions set forth in paragraph 1". Goldman, *Termination of War Contracts*, 42 Mich. L. Rev. 733, 745. (Italics supplied.)

tion settlement would be honored only where the original contracts were so amended "by agreement". That the Navy Department also so construed the authority confirmed by the First War Powers Act is apparent from the terms of its directives of September 16, 1942, July 7, 1943 and December 15, 1944 on the subject. Part IV, Amendments And Modifications Of Contracts, *Navy Procurement Directives*, pp. 5711-5715.

The petitioner cannot, of course, gain comfort from the administrative and judicial application of World War I statutes, for vital and controlling differences in terminology make those statutes inapposite. The World War I statutes referred to specifically authorized the President to "modify, *suspend, cancel* * * *" (Emphasis supplied to Act of June 15, 1917, 40 Stat. 182) whereas the First War Powers Act of World War II merely gave the power to amend, *not* to cancel.

That petitioner's present argument as to its statutory right of unilateral cancellation is made of whole cloth is apparent from the Attorney General's contrary disposition of the problem in 1943. During the course of the Senate hearings on the problem of contract termination, Senator James E. Murray, Chairman of the Subcommittee, wrote the Attorney General, under date of November 29, 1943, as follows (Senate Hearings, *supra*, fn 7, pp. 521-522):

> "Seventh, many divergent views have been presented to members of the committee concerning the common-law rights of a contractor whose contract has been terminated, as distinguished from his rights under a termination clause. Would it be possible for you to analyze these common-law rights in detail for the benefit of the committee, comparing them point by point with the rights of a contractor under the standard clause now used by the War Department."

In response, the Attorney General submitted a memorandum stating (Senate Hearings, *supra*, fn 7, p. 529):

"7. COMMON-LAW RIGHTS OF A CONTRACTOR WHOSE CONTRACT HAS BEEN TERMINATED, COMPARED WITH A CONTRACTOR'S RIGHTS UNDER A TERMINATION CLAUSE.

"In general it may be said that the difference between the common-law rights of a contractor whose contract has been terminated and the rights given by the standard termination-clause now in use by the War Department is the difference between the right to recover damages for a breach of contract and the right to have the contract performed in accordance with its terms. * * *

"In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed. However, there are a number of conditions which the contractor would have to meet in order to be assured of complete relief. For example, he would have to demonstrate that he had taken reasonable steps to mitigate his damages; that particular items of loss were reasonably within the contemplation of the parties as probable consequences of a breach, and that they were occasioned by the breach; that anticipated profits claimed to have been lost would have been earned but for the breach, and that they were not too speculative and remote; etc.[10]

[10] Earlier during the aforementioned Senate hearings, Attorney General Biddle confirmed the necessity of bilateral action to avoid the consequences breach by stating (p. 343):

"Even in the absence [from the contracts] of the termination provisions which I have mentioned, I think it clear that the contracting agencies have the power to negotiate with their contractors for the termination of contracts * * *"

Thus at a point of time determinative of the rights and liabilities in this cause, the Attorney General unequivocally stated to the Congress, as a basis for legislative action, that absent a termination clause, the government was liable for breach of contract upon its unilateral cancellation, and that in such event anticipatory profits could be recovered. The same view was expressed and acted upon by the contracting services. Thus the War Department's text, *Government Contracts and Readjustment* (published for use as a training manual for J. A. G. officers) states, (at pp. 159-160, 178-179 (fn. 50)):

> "To permit such termination without liability for breach of contract, the War Department, since 16 September 1941, has included in its contracts a termination article giving the Government the right to terminate the contract for its convenience or its option."
>
> "The Government is liable for breach of contract where it prevents performance by the other party to a contract. See Ch. VIII, 'Performance and Breach by the Government'. Ordinarily cessation of the war or lack of use for the war material contracted for does not relieve the Government of liability under a duly authorized contract. It has, however, been held that the existence of a statute authorizing the President to terminate a war contract and pay reasonable compensation to the contractor will bar recovery of anticipated profits, on the theory that the statute was an implied condition of the contract. *Buffalo Union Furnace Co. v. United States Shipping Board Emergency Fleet Corp.* 291 Fed. 23 (C. C. A. 2d, 1923). See also *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923). This principle might be applied to war contracts not containing termination articles in view of the provisions of the Contract Settlement Act".
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> "JTR 214.2. Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act (i.e. after July 1, 1944) contain an implied condition that such contracts may be terminated upon payment of fair

compensation as defined in the Act. See Ch. XIV, 'The Contract Settlement Act.' This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article".

The same conclusion is reached by writers conversant with the termination problem. Malman, discussing Army Procurement Regulation 15, published August 14, 1943, states (*Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems 449, 466-467):

> "Contracts containing no termination article may be terminated and finally settled by supplemental agreement where such termination is to the interest of the Government. Even here, however, and apparently to avoid the consequences of a breach of contract, the contract is to be amended whenever possible to contain the standard form of termination article, or to provide some other mutually acceptable basis of settlement, either before or after the contractor has been ordered to stop work. Where no satisfactory agreement can be reached with the contractor, he may nevertheless be ordered to discontinue further performance. This the War Department recognizes as a breach of contract; PR 15-311 (4) states that the 'contractor may thereafter present his claim if any, for damages arising out of this order, to the General Accounting Office or other courts for settlement.' However, PR-15-311 (4) discourages the use of such orders to stop performance stating that it 'is not consistent' with War Department policy for the Government to commit breaches of contract * * * "

Final proof of the fact that prior to the enactment of the Contract Settlement Act of 1944 (July 1, 1944, C. 358, 58 Stat. 649, 41 U. S. C., Supp. V, 101 et seq.), the government could not, in the absence of an express termination clause, cancel or terminate its war contracts without ordinary liability for breach of contract, is the fact of the adoption of that statute. Both its history and terms une-

quivocally show that it was adopted in order to give the government authority to terminate contracts unilaterally if necessary—which authority did not previously exist in the absence of express contract provisions—and to provide standards for compensation different from those consequent upon breach of contract.

In summary, it is apparent not only that was there no understanding, nor articulated Navy policy or directives by reason of which a government right of unilateral cancellation could fairly or properly be read into the contract here in question, but also that no legal authority for unilateral cancellation existed when the instant contract was executed and terminated. It is equally clear that before 1944 and when the instant contract was executed and cancelled liability for breach of contract was properly assumed to follow in the wake of unnegotiated government termination. Accordingly, what petitioner's present argument resolves itself down to is an attempt to inject an entirely new concept into government contract law. While it has always been recognized that except for qualifying legislative fiat as an exercise of sovereign right, the government's obligation on contracts is the same as that of private parties (*Smoot's Case*, 15 Wall. 36, 47), petitioner now in effect urges that even in the absence of agreement or proper sovereign action by the Congress, its contract obligation is modified by subsequently articulated administrative policy. Such a contention vitiates the necessary doctrine that even the government is governed by law; it is a notion that would be destructive of all public contract relationships.

CONCLUSION.

The judgment of the Court of Claims allowing respondent anticipatory profits is fully supported by its positive findings of fact predicated on substantial evidence, not in the record here, that petitioner and respondent entered into a contract, that petitioner breached the contract and that had respondent been permitted to perform it would

have made a net profit of not less than $80,000. That judgment was required by the ordinary law of contracts and damages applicable to government contracts in the absence —as here—of any controlling contractual or statutory provision to the contrary. Accordingly, the decision below is correct, and there is involved no question of importance or conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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